UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

THE GUARD PUBLISHING COMPANY, d/b/a THE REGISTER-GUARD	)	
and	)	Cases 36-CA-8743-1 36-CA-8849-1
EUGENE NEWSPAPER GUILD, CWA LOCAL 37194	)	36-CA-8789-1 36-CA-8842-1

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT THE GUARD PUBLISHING COMPANY

Stephen A. Bokat
Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington DC 20062
(202) 463-5337
Counsel for the Chamber of Commerce of the United States of America

John N. Raudabaugh
BAKER& MCKENZIE, LLP
130 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2838
Counsel for Amicus Curiae Chamber of Commerce of the United States of America

J. Robert Brame III
MCGUIREWOODS LLP
310 4th Street NE, Suite 300
P.O. Box 1288
Charlottesville, VA 22902-1288
(434) 977-2500
Counsel for Amicus Curiae Chamber of Commerce of the United States of America

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I. Interest of the Amicus

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents a membership of more than three million businesses and organizations of every size, in every business sector and geographical region. An important function of the Chamber is to represent the interests of its members in cases addressing issues of widespread concern to the American business community. The Chamber has participated as amicus curiae in many dozens of cases before the National Labor Relations Board and the courts. Given the enormous costs, risks, and the evolving burdens and liabilities, the interests of the business community require a statement of position that is broader and more encompassing than the more limited interests of the litigants.

II. Introduction

A. Technology Issues Affecting Electronic Data Management Systems and Employers' Policy Responses.

Although the case is postured as one involving email, and the National Labor Relations Board's ("NLRB" or "Board") questions refer to email and "computer-based communication systems", we believe a proper understanding of the issue must begin with the broader technology.[1] Email is but one among many functions performed by electronic data management systems ("EDM Systems"). EDM Systems are the means by which businesses (and individuals) store, manipulate and transmit digital information.

[1] Although the issue before the Board concerns email, email is now supplemented by instant messaging and, undoubtedly, further developments will present even more communication tools. The questions presented by the Board suggest that the Board is interested in a general application that serves as a useful guide to employers and employees. We have chosen to address the broader issues.

Few, if any, employers buy a stand-alone email system, in the way that employers buy or lease telephone systems or attach bulletin boards to the wall. Rather, employers purchase complex EDM Systems that use widely varying hardware and software configurations for managing their business, only one function of which is email.

EDM Systems are designed as production tools and power the information economy. They control and direct machinery, process financial data, manage inventory, place orders, and transmit pictures and documents and immeasurably increase the speed of verbal and non-verbal communication. E-mail is the most familiar form of electronic communication, but communication components include online journals ("work logs" or "blogs"), instant messaging (in which users conduct real-time, online "chats"), conferencing webcams, document and video transfers, and broadband voice services. Employers invest heavily in EDM Systems processes and, increasingly require employee proficiency.[2]

The "PC" or work station is the most familiar face of EDM Systems and the combined system constitutes a powerful instrument capable of enormous value to the employer, to the employer's business, and to the employer's employees. Such systems, however, also are subject to misuse which may harm the business. Employees and non-employees may send harassing and intimidating messages to employees, managers and third parties; they may download ("steal") intellectual property from the employer or third parties; disparage the company, its products and services, customers and competitors; or covertly transfer stolen data to remote locations or store it in the employer-furnished memory. Users can display or distribute materials which courts have

[2] Internet: An Overview of Key Technology Policy Issues Affecting Its Use and Growth, CRS Report for Congress, April 13, 2005.

deemed harassing and illegal; create and post defamatory material on internet sites and weblogs; and plot or even execute crimes, all from the workplace with covert use of the employer's equipment.[3]

Legal or "harmless" activities can also inflict high costs, and the temptation to engage in such "harmless" conduct is enormous. In a 2004 survey of 840 U.S. employers regarding their employees' daily, personal use of the employers' computer networks, 66% responded that employees spent two hours or less on the company's system, 24% spent two to three hours and an additional 10% spent more than four hours.[4] The same survey reported that 75% of employees send or receive 10 or fewer personal emails daily.[5] With instant messaging, 90% of employees spend up to 90 minutes daily engaged in personal use. 19% of them add attachments to text messaging, 16% distribute jokes, gossip or disparaging remarks, 9% send confidential information, and 6% distribute sexual, romantic or pornographic text in their messages.[6]

The internet port is an open gate that can expose the employer's most valuable resources to third parties. Unsolicited emails account for 73% of all inbound emails.[7] Most are annoyances or merely waste time, but malware or malicious logic, such as viruses, worms, downloaders, trojans, spam, link spam, phishing, and pharming endanger

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[3] Federal Employment Law Insider, September 2006 at 2; Treasury Inspector General for Tax Administration "Inappropriate Use of Email by Employees and System Configuration Management Weaknesses are Creating Security Risks," July 31, 2006.
[4] "2004 Workplace E-Mail and Instant Messaging Survey," AMA/ePolicy Institute Research, 2004.
[5] Id.
[6] Id.
[7] Id.; "Wireless Privacy and Spam: Issues for Congress," Congressional Research Service Report for Congress, December 22, 2004; "Junk E-Mail': An Overview of Issues and Legislation Concerning Unsolicited Commercial Electronic Mail ("Spam")," Congressional Research Service Report for Congress, April 15, 2003.

the employer's network and the business information and intellectual property it houses.[8] Outside parties can "hack" into the employer's trade secrets and confidential information, steal passwords, and redirect users to download sites. Of these attacks, 33% are reportedly generated by internal users.[9] Finally, there is the threat that an inappropriate working environment may be fostered in the form of harassing emails, pornographic displays, or off-color jokes. These invasions, along with oversight failures, often generate claims of invasion of privacy, defamation, harassment, trade secret and copyright infringement, and personal data and financial disclosure.[10]

To defend and protect against abuses, virtually every workplace computer is protected by a series of screening devices or filters. Whatever the threat, an employer's failure to monitor electronic communications from and entry into its equipment can result in significant liability. But, as noted, not all threats are external. One third of data thefts are committed by current employees, and the overwhelming number of actionable disparagement, intimidation and harassment allegations arise from authorized users, necessitating prophylactic monitoring and screening. Employers are uniformly advised by counsel to inform employees that computers are the employer's property, that they exist for business purposes, that communications are subject to monitoring at any time,

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[8] "Evolving Email, Web and IM threats and how to manage them," MessageLabs, 2006; "Phishing and Pharming," Websense, Inc. 2006; "The Economic Impact of Cyber-Attacks," Congressional Research Service Report for Congress, April 1, 2004.

[9] Scott Berinato, "The Global State of Information Security 2005," Price-WaterhouseCoopers and CIO, September 15, 2005.

[10] "2006 Workplace E-Mail, Instant Messaging & Blog Survey: Bosses Battle Risk by Firing E-Mail, IM & Blog Violators," AMA, July 11, 2006.

and that employees should have no expectation of privacy in the use of a job-related PC.[11]

The risks associated with electronic communications bring with them potentially substantial costs beyond liability. The backup systems internal and external to a worker's PC or workstation mean that even "erased" copies of most electronic communication passing through the PC are retained somewhere in the employer's system. The recent survey of 840 U.S. businesses noted above revealed that more than one in five companies has had electronic communications subpoenaed during the course of litigation or a government investigation in 2004.[12] This figure is more than double the percentage reported in 2001.[13] Effective December 1, 2006, amendments to the Federal Rules of Civil Procedure require the retention and storage of electronic documents, and the production of such data that reasonably may relate to a party's allegations in litigation. [14] Storage capacity must be expanded to satisfy these retention obligations, which also may sweep-up hundreds or thousands of personal and non-business documents and communications that have traveled on the employer's system. Discovery requires a responding party to shoulder the substantial costs of most electronic communication production, including the costs of locating, printing and reviewing stored material.[15]

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[11] "Monitoring Employee E-Mail: Efficient Workplaces vs. Employee Privacy," 2001 Duke L. & Tech. Rev. 0026 (2001).
[12] AMA/ePolicyInstitute Research, 2004 Workplace Email and Instant Messaging Survey Summary, 1.
[13] Id at 2.
[14] Allen Smith, "Amended federal rules define duty to preserve work e-mails," HR News, December 1, 2006.
[15] See, e.g., Rowe Entertainment v. The William Morris Agency, 205 F.R.D. 421 (S.D.N.Y. 2002); Zubulake v. UBS Warburg, LLC, 216 F.R.D. 280 (S.D.N.Y. 2003); Wiginton v. Ellis, 2004 U.S. Dist. LEXIS 15722 (N.D. Ill. Aug 9, 2004). (For a summary of these cases and the current state of the law of cost shifting in electronic discovery, See Peter J. Kok and Catherine Tracey, The High Cost of Litigation in the Electronic Era: Who Will Bear the Burden?, Bender's Lab. & Empl. Bulletin, Vol. 4, No. 10, October 2004); "Edata and Discovery," ACC Docket at 22, January/February 2007.

These costs can be substantial, and employers must be prepared for such possibilities, even if only to defend themselves from an unmeritorious action.[16]

Not surprisingly, employers must also comply with an increasing number of laws regulating electronic communications, and new legislative proposals abound.[17] Much regulation concerns the protection of sensitive personal information, e.g., Electronic Communications Privacy Act of 1986; Health Insurance Portability and Accountability Act of 1996; Children's Online Privacy Protection Act of 1998; Gramm-Leach-Bliley Act of 1999; Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003; California Security Breach Notification Act of 2002; and numerous other domestic and foreign laws and regulations.[18]

Where once it was commonplace that "work time is for work," the demarcations that have separated "working time" from "non-working time" perhaps have become less precise. U.S. employers and regulatory agencies, and the rules they adopt must account for these new realities. In the typical 19th and early 20th Century manufacturing environment, machinery was fixed in place and employees worked under close supervision. When the job ended, employees left the worksite, and management had the

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[16] The software and hardware which power EDM Systems may be the employer's single largest investment and central to its success. Historically, our legal system entitles such investment as "property" and recognizes the right of the "owner" both to control its use and enjoy the fruits of its production. Liability for harm caused by or on the property is another aspect of ownership. For example, the owner of land may be liable to neighbors for nuisances on the property and, more broadly, to others armed by inappropriate conduct undertaken on the property. The right of control is even more necessary with EDM Systems because of the almost immeasurable potential for harm. The owner is most frequently at risk for employee use that results in electronic thefts, harassment and other misuses, under doctrines of negligent entrustment, apparent authority and respondeat superior. The Board must therefore recognize the strong need for the owner/employer to control access.

[17] Hillel I. Parness, "Legal Risks of Uncontrolled Email and Web Content," MessageLabs; "Data Security: Federal and State Laws," Congressional Research Service Report for Congress, February 3, 2006; "Data Security: Federal Legislative Approaches," Congressional Research Service Report for Congress, February 9, 2006; "Obscenity and Indecency: Constitutional Principles and Federal Statutes," Congressional Research Service Report for Congress, June 25, 2003.

[18] Allan Holmes, "The Global state of Information Security 2006," CIO Magazine, September 15, 2006.

opportunity to observe mischief at its inception. With increasing employee empowerment, and the thinning of supervisory ranks, direct observation of misconduct has become more difficult, and employers necessarily have placed greater emphasis on preemptive steps to prevent possible misuse.

In the face of increased regulation, litigation, and the costs of avoidable error, employers are using workplace policy, in addition to technology, to manage productivity, protect resources and motivate employee compliance. Reportedly, 80% or more of employers inform workers that the company monitors content, keystrokes and time spent at the keyboard; 76% monitor employees' website activity; 65% block connections to inappropriate websites; 82% make clear that the company stores and reviews computer files; 86% alert employees to e-mail monitoring; and 89% notify employees that their web usage is being tracked.[19] In 2005, reportedly 84% of employers had established policies governing personal e-mail use, 81% had policies governing Internet use, 42% had in place policies regarding personal instant messaging, 34% addressed the operation of personal websites on company time, 23% had policies regarding personal postings on corporate blogs, and 20% of corporate policies restricted the operation of personal blogs on company time.[20] In the same year, 26% of employers acknowledged firing workers for misusing the Internet and 25% terminated employees for e-mail misuse.[21]

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[19] "2005 Electronic Monitoring & Surveillance Survey," AMA/ePolicy Institute Research, 2005.
[20] Id.
[21] Id.

III. Employees and Unions Have No Statutorily Protected Right to Use An Employer's Computer System Without Consent.

The Supreme Court held nearly fifty years ago, "the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, or that they are entitled to use a medium of communication simply because the employer is using it." NLRB v. Avondale Mills, *357* U.S. 357, 364 (1958). Indeed, as the Board recently held, "there is no statutory right of an employee to use an employer's equipment or media." Mid-Mountain Foods, Inc., 332 N.L.R.B. 229, 230 (2000). Thus, the Board routinely upholds employer-imposed limitations upon employee use of employer equipment such as bulletin boards, telephones, copying equipment, public address systems, and television sets for non-business purposes. See Honeywell, Inc., *262* N.L.R.B. 1402 (1982), enf'd, 772 F.2d. 405 (1983) (bulletin boards); Union Carbide Corp., 259 N.L.R.B. 974, 980 (1981), enf'd in rel. part, 714 F.2d 657, 663-64 (1983) (telephones); The Health Co., 196 N.L.R.B. 134 (1972)(public address systems); Mid-Mountain Foods, Inc., 332 N.L.R.B. at 230-31 (televisions, and collecting cases).

The Seventh Circuit has cogently explained the rationale underlying these long-settled principles, which is simply that while the Act prevents employers from discriminating against unions, it does not require employers to provide supplies and equipment to promote them:

> Section 7 of the Act protects organizational rights – including the right to oppose the union's campaign – rather than particular means by which employees may seek to communicate. Just as the right of free speech and association in the political marketplace does not imply that the government must subsidize political parties by distributing their literature

> without charge or giving them billboards on public buildings, so the right of labor organization does not imply that the employer must promote unions by giving them special access to bulletin boards.

Guardian Industries Corp. v. NLRB, 49 F.3d 317, 318 (7th Cir. 1995) (internal citations omitted).

These established principles apply with equal force to rules limiting the non-business use of employer computer and electronic mail systems. In one of the few Board decisions to consider the issue of access to electronic mail, a Board administrative law judge ("ALJ") did just that, analogizing an employer rule prohibiting employee non-business use of electronic mail to cases involving bulletin boards and the like, and holding that "Respondent could bar its computers and Email system to any personal use by employees." Adtranz, ABB Daimler-Benz Transportation, Inc., 331 N.L.R.B. No. 40 (2000). In Adtranz, a group of employees used company computers to perform their work, and utilized company electronic mail systems for the same reasons. *Id.* at *4. The employer chose to prohibit all personal use of its electronic mail systems, although the evidence established that certain employees used the systems for non-business purposes. *Id.* Relying upon precedent upholding employer limits on employees' personal use of bulletin boards, telephones, and other employer-owned equipment, the ALJ determined that the company rule prohibiting all personal use of electronic mail was valid, and that it had not been discriminatorily applied.[22] *Id.*

22. Although the ALJ's decision in *Adtranz* was appealed to the NLRB, no party appealed the judge's dismissal of the General Counsel's allegation that the company unlawfully limited email use. *Id.* at n.1.

Similarly, even the General Counsel has acknowledged "that...computer systems...are also the Employer's property which, like Employer bulletin boards, can in certain circumstances be regulated. Thus, an employer may lawfully, i.e. nondiscriminatorily, limit the use of computer equipment..." National TechTeam, Inc., 2000 WL 1741874 (N.L.R.B.G.C. Apr. 11, 2000) (concluding that employer could lawfully discipline employee for using employer's computer system to draft and print a non-work related document advocating a union position).

Email and computer based communications systems are only a part of the employer's EDM System production tools. An EDM System communication may be primarily non-verbal, such as machine controls, inventory management, and ordering systems. If the EDM System facilitates verbal e-mail business communications, an employer *may* choose to allow limited or incidental personal e-mail communication, but such personal communication is purely collateral to the primary business purpose for which the equipment has been acquired and maintained. As noted, the NLRB has long-standing rules that employers are not obligated to make available to employees its business-only bulletin board, telephones, or copy machines.[23] Those capital expenditures were made for production and other business purposes, and are employer property in which no employee Section 7 right inheres. The same rules logically apply in the case of EDM Systems acquired for business purposes, where the risks of harm, and potential liabilities due to misuse, are far greater.

[23]Express Scripts, Inc., 2005 WL 545229 (N.L.R.B.G.C. February 24, 2005); Ocean Spray Cranberries, Inc., 2002 WL 1756483 (N.L.R.B.G.C. May 22, 2002); TXU Electric, 2001 WL 1792852 (N.L.R.B.G.C. February 7, 2001); Electronic Data Systems, Inc., 1995 WL 937194 (N.L.R.B.G.C. March 22, 1995).

A. An Employer May Not Discriminate Among Non-Business Uses of His EDM Systems.

If an employer allows its employees to use its equipment to access the intranet, internet or both for personal use, even on an isolated or incidental basis, traditional Board rules would prohibit that employer from discriminating between various non-business uses. Where an employer grants its employees the right to incidental personal use, that use oftentimes is subject to other restrictions, such as limitations regarding size, attachments, bulk or mass mailings and other neutral criteria not based upon content or subject matter. In addition, as previously noted, employers routinely monitor and screen e-mail for content to guard against data theft, to minimize liabilities, and to preserve the integrity of the EDM systems. In examining this area, it is essential that the NLRB recognize the existence of such neutral non-discriminatory limitations and practices, and accommodates its jurisprudence to them.

B. Traditional Solicitation and Distribution Rules are Inapplicable to EDM System Communications.

Traditional labor law draws a distinction between solicitation and distribution.[24] Electronic communication implicates elements of both solicitation and distribution.[25] Yet, to attempt to fit it into one of the existing slots strains the analytical framework.

Electronic communication could be viewed as a form of solicitation. It may take the form of a real time conversation, as occurs when employees communicate via instant messaging or via a series of successive, responsive email messages. Electronic communication may also be viewed as a form of distribution. It can be stored for later

[24] Our Way, supra.
[25] Pratt & Whitney, 1998 WL 1112978 (N.L.R.B.G.C. February 23, 1998).

reference and printing, and is therefore arguably more permanent and more intrusive than a simple verbal or written communication. The easy manner in which an electronic communication can be multiplied by the use of broadcast or bulk mailings, however, constitutes communication on a new order of magnitude. Instead of individual solicitation or distribution to a small group, one e-mail instantly can be transmitted to hundreds of employees.

Judge Greene recognized the unique qualities of electronic communications in Prudential Insurance Company of America, 2002 NLRB LEXIS 551, at 29 (N.L.R.B. Nov. 1, 2002). "[A]lthough E-mails are certainly a form of communication, they cannot in my opinion, be simply fit into either the solicitation or distribution boxes from which the current law is derived. E-mails are like oral solicitations *and* they are like letters. For better or worse, although they share characteristics of each, E-mail should have a pigeonhole of its own."[26]

Existing solicitation and distribution rules also draw distinctions between a non-work area or facility and a work area or work tool. While a cafeteria or a bulletin board might facilitate work, they are neither work-tools like punch presses or extruders nor work areas like the "shop floor." They may be in the same vicinity, but one functions entirely independently of the other, and use of one does not inhibit the use of the other. A PC or a workstation is a work tool provided by the employer to convey data and instructions, to drive machinery, and to support the product flow essential to the employer's business. Use of the PC for non-work purposes interferes with the operator's

[26] 2002 NLRB LEXIS 551 at 29 (holding an email restriction as overly broad against Section 7 rights, though distinguishable on the facts in that case involved insurance agents with no office workplace who did their either traveling or from their residence).

ability to "produce," either momentarily while checking an incoming e-mail, or for longer periods of time to surf the internet or engage in instant messaging. Personal use of a PC or workstation co-opts the employers "work tool" and diverts it from its intended purpose, rendering it temporarily unproductive. The NLRB, in fashioning its email rules, therefore, must be cognizant of an employer's reasonable efforts to maintain its capital investments for business purposes, and to limit, or eliminate the non-business use of such equipment or systems during an employee's working and non-working time lest the system become overrun, and burdened, by non-business data and information.

Electronic communications, thus, pose unique challenges to fashioning a workable rule. Personal non-business use hijacks an employee's productivity, precluding productive use of the employer's investment. When an employee stops work to check a newly arrived email, or surfs the internet, or responds to an instant message, such an intermittent cessation of work is not analogous to a paper message passively placed on an employer's bulletin board, or a break-time discussion in the lunchroom. Unlike an assembly line employee who may engage in a casual chat with a coworker while attending to repetitive tasks, checking an e-mail message or downloading an attachment, or engaging in an on-line chat effectively commandeers the very tool provided to the employee with which to work.

The Board must adopt flexible new lenses through which to view electronic communications and EDM Systems. Limitations or non-discriminatory prohibitions upon an employee's personal use of the system and upon internet access must be deemed routine and appropriate.

IV. Non-Employees, Including Union Representatives, Have No Right Under the NLRA to Utilize the Employer's Computer System.

It is well established that non-employee, union organizers and representatives, have no statutory based right to gain access to the employer's computer system for purposes of communicating with employees. See discussion, *supra* at pp. 7-8. While the union has the right to seek representative status, or to exercise its role as collective bargaining representative, it may not require the employer to make its modes of communication available for such non-business purposes. Indeed, an employer must be able to restrict incoming electronic communications that a non-employee sends from outside the employer's network to within the employer's network. It is well settled that non-employees have no Section 7 rights, and that an employer's property rights are superior to the right of non-employee union representatives to access that property for distribution purposes. In NLRB v. Babcock & Wilcox Co., the Supreme Court held that, with respect to union access to company property for distribution, "no such obligation is owed nonemployee organizers."[27] The Court later bolstered Babcock in Lechmere v. NLRB, holding that, "Babcock's teaching is straightforward: § 7 speaks to the issue of nonemployee union organizers *except* in the rare case where 'the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels."[28] The Court continued, "[w]here reasonable alternative means of access exist, § 7's guarantees do not authorize trespass by

[27] 351 U.S. 105, 113 (1956).
[28] 502 U.S. 527 at 537 (1992) (citation omitted, emphasis in original).

nonemployee organizers, *even* 'under...reasonable regulations' established by the Board."[29]

Most employers severely restrict access to their EDM systems by outsiders not only to maintain the integrity and security of their systems, but also to prevent their systems from being overrun by non-business uses. Nothing in the NLRA countenances, much less requires, an exception to such policies. Surely, the Act does not require that an employer make its instrumentalities of communication available to the union organizer or representative as a general matter. Moreover, it is highly unlikely that the very narrow exception that has been recognized under the statute where reasonable alternative means to access employees do not exist can be found in an electronic age where computers, email addresses and mailboxes, and union websites abound. Any employee, even one who does not own a computer, can obtain an email account, usually for free, utilize a computer at the local library, or an internet café, and log onto the union's website. No employer need surrender its proprietary interest in, or its security policies regarding, his EDM system in the name of NLRA rights.

V. Employers Have the Right to Set Restrictions and Limitations on Email Use that Preserve the Business Purpose of the System and that Ensure Its Security and Integrity.

An employer may place reasonable limitations and restrictions on employee use of email including, among other things, the number of addressees, the size of attachments, and the frequency and duration of use. A typical employer email policy, for example, will state that the system is for business purposes, that there should be very limited use for non-business purposes, and that no employee may transmit mass or bulk

[29] Id. (citation omitted, emphasis in original).

emails without prior approval by a manager. Such policies typically also state that bulk emails for non-business purposes will not be approved under any circumstance because mass mailings slow down, impede or otherwise interfere with the efficient operation of the system. Even business bulk transmissions will be subject to prior authorization because of the potential untoward affect on the system. Only those mass mailings deemed essential to the business will be approved.

In such a regime, incidental personal use is tolerated, whether to communicate with a fellow employee about lunch plans, about Girl Scout cookies, or about a union meeting. Mass mailings for any non-business purpose, however, will be disallowed, and, as noted, not even all requests for mass business mailings will be approved because of the impact on the system.

The General Counsel generally has suggested that such a rule is "facially lawful". In his 2001 TXU Electric Advice Memo, the Associate General Counsel stated:

> We...conclude that the Employer's revised E-mail policy is facially lawful. As previously noted the Employer implemented a revised E-mail policy that permits employees to use the E-mail system for personal use, but limits the length of the message and number of employees to which a particular E-mail may be sent. Such limitations are lawful as the Employer has submitted sufficient evidence demonstrating a substantial business justification. Moreover, the E-mail policy narrowly addresses the Employer's legitimate business concerns while adequately balancing employees' Section 7 rights and the Employer's managerial interests.[30]

Subsequent General Counsel Advice Memoranda have reached the same conclusion that reasonable restrictions are acceptable, and for the same reasons.[31]

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[30] TXU Electric, 2001 WL 1792852, at *4 (N.L.R.B.G.C. February 7, 2001).

[31] Express Scripts, Inc., 2005 WL 545229 (N.L.R.B.G.C. February 24, 2005); Boeing Co., 2004 NLRB GCM LEXIS 81 (N.L.R.B.G.C. May 4, 2004); Associated Press, 2002 WL 31357927 (N.L.R.B.G.C. August 21, 2002).

Employers should be permitted to formulate reasonable limitations and restrictions on employee use of the employer's electronic communications that are designed to preserve the business purpose of the system, and to ensure the system's security and integrity.

VI. The Location of An Employee's Workplace is Irrelevant to An Employer's Oversight, Maintenance, and Control of its EDM System.

As previously discussed, non-employee union organizers have no right of access to company property except where "the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels."[32] An employer's EDM System should not be viewed as an alternate form of access to employees for either organizational or representational purposes. Employer communication systems belong to the employer and are to be utilized for business purposes. The law is clear that "an employer cannot be compelled to allow distribution of union literature by non-employee organizers on his property," Lechmere, 502 U.S. at 533, except in the relatively rare case where the union has no alternative means to access employees. Thus, "an employer may validly post his property against non-employee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message ..." NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956). As the D.C. Circuit succinctly put it, "under Section 7 of the NLRA, *the private property interest of an employer is sacrosanct as against uninvited non-employees, except in the narrow circumstances where the non-employees are union organizers who have no other*

[32] Lechmere v. NLRB, 502 U.S. 527 at 537 (1992); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956)

reasonable means of communicating with the employer's employees." UFCS v. NLRB, *74* F.3d 292, 295 (D.C. Cir. 1996) (emphasis added).

These principles are not limited to non-employee union organizers. The Board has expressly rejected the notion "that more liberal access principles should govern where . . . a union is acting on behalf of employees whom it already represents." L'Enfant Plaza Properties, Inc., 316 N.L.R.B. 1111, 1112 (1995). Instead, the Board enforces "the 'general rule' against trespassory activity . . . outside the organizing context." Leslie Homes, Inc., 316 N.L.R.B. 123, 127-28 (1995). In fact, as the D.C. Circuit has held, "in the absence of an inaccessibility showing, the locus of accommodation for cases involving trespass by nonemployee union adherents *will always fall in the range favoring denial of access*," irrespective of the context in which the union's attempt to communicate arises:

> [A]lthough Babcock and Lechmere were organizational cases, the reasoning therein *is equally applicable in any situation where the exercise of a section 7 right requires communication of a message to a target group.* In all such target-audience situations, Babcock and Lechmere indicate that the degree to which the exercise of asserted section 7 right depends on trespassory access to an employer's property — i.e., the degree to which the target audience is otherwise inaccessible — should be the critical consideration in the accommodation analysis; and the locus of accommodation should always fall in the denial-of-access range if there has been no showing that the target audience is not reasonably reachable through nontrespassory means of communication.

UFCW, 74 F.3d at 299 (emphasis added). In other words, no matter the context, "Babcock establishes (and Lechmere reaffirms) a general rule under which an employer

may deny access to non-employees seeking to trespass on the employer's property." UFCW, 74 F.3d at 297.

Numerous other, nontrespassory means of reaching employees exist, both to employees and non-employees, and whether the target employees work in close proximity at a single location, or apart in remote locations. Virtually every international union, like any other membership organization of any size, has its own website on which it can post information, bulletins, forms, and questionnaires. Employees who do not have a computer of their own have access to libraries, internet cafes and other commercial and business work centers where computers are available, often at no cost. In addition, various internet service providers like Yahoo and Google offer email addresses and mailboxes with enormous storage capacities at no cost.

Simply put, nothing in the NLRA justifies requiring an employer to make his business communication system available to employees or to non-employees for a non-business purpose. Adequate alternative means of communication, with similar efficiencies and speeds to the employer's system, exist. Such adequate alternative means are not limited by distance or location, and, they are ready and available for those sufficiently motivated to seek them.

VII. A Union Demand for Non-Business Use of An Employer's EDM System is Not a Mandatory Subject of Bargaining.

The question of whether all uses of an employer email system is a mandatory subject of bargaining is not clear. We know from NLRB v. Borg Warner, 356 U.S. 342 (1958) that insistence to impasse on a non-mandatory topic of bargaining constitutes an unlawful refusal to bargain in good faith. We also know from Allied Chemical and

Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) that a mandatory subject of bargaining "vitally affects" the terms and conditions of employment of bargaining unit members. Board cases rather cursorily have held on facts not entirely analogous here, that the use of, or an employer's policies regarding, company telephones, for example, *are* mandatory topics for bargaining. Illiana Transit Warehouse Corp., 323 NLRB No. 12 (1997); American Warehousing and Distribution Services, Inc., 311 NLRB No. 39 (1993). But when a Union insists upon the right to use an employer's EDM system for non-business purposes, whether for unit employees or for the union itself, such a demand hardly seems to vitally affect terms and conditions of employment of bargaining unit members. A union lawfully may insist upon use of a portion of a bulletin board to post union notices. NLRB v. The Proof Co., 242 F.2d 560, 562 (1957). But if a union insisted that its employee officials have the right to use an employer's unused vehicles during the weekend to pay visits to bargaining unit members, would the Board say that such a proposal vitally affects terms and conditions, and the union could refuse to sign an agreement without such a provision?

Employers invest hundreds of thousands of dollars in their EDM systems. The sole purpose of those systems is to aid the employer in the conduct of that business. It should be clear that an employer has no more obligation to bargain over the non-business use of such an integral part of his business than a newspaper, like the Guard here, has to bargain over a union demand that members may utilize the company's printing presses for a non-business purpose.

VIII. The NLRB May Not Construe the Statute in a Manner that Raises Constitutional Concerns.

Well established NLRA principles justify an employer's control and protection of his EDM system. The statute does not guarantee employees or unions access to employer owned modalities of communication for non-business purposes, and indeed, an employer is privileged to segregate his EDM system for his exclusive business use. We are satisfied, therefore, that existing NLRA rubric protects the employer's significant and substantial capital investment in this business tool.

In the event, however, questions may linger whether and under what circumstances the NLRA may allow the Board to impose upon an employer the duty or obligation to make his proprietary communication system available for purposes not related to his business, or for causes with which he does not agree, there is a cautionary note. The Supreme Court has held in a significant line of cases, albeit in different circumstances, that an employer may not be compelled to make his means of communication available to those with whom he does not agree, or to those who espouse views contrary to his views or interests without infringing upon *the employer's* First Amendment rights.

Thus, for example, a utility company may not be compelled to place inserts in its monthly bills to customers written by those with contrary interests, even though it would be speedy or efficient to do so. Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 544 (1980). Likewise, a newspaper may not be compelled to allow a reply on its letterhead to opinions or political positions the paper has taken. Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).

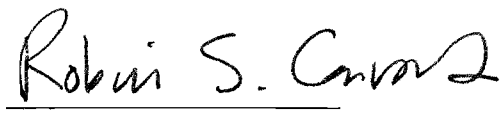
There are other so-called "compelled speech" cases. Boy Scouts of America v. Dale, 530 U.S. 640 (2000); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995); Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983); Larry Alexander, Compelled Speech, 23 Const. Comment. 147 (2006).

The caution here is not that employee or union access to an employer's EDM system necessarily implicates the employer's First Amendment right to use his modalities of communication for his own purposes, but rather that the Board should not construe the NLRA in a manner that raises a spectre of constitutional concerns. While the Board is entrusted in the first instance with adumbrating the various duties and obligations arising under the NLRA, it must do so in a way that obviates constitutional infirmities. Edward J. DeBartolo Corp. v. Florida Gulf Coast Building, 485 U.S. 568, 575 (1988); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979); Jewish Day School of Greater Washington, 283 NLRB No. 757, 759-762 (1987).

IX. Conclusion

For all of the foregoing reasons, the Chamber of Commerce of the United States of America urges the National Labor Relations Board to hold that an employer may impose reasonable limitations and restrictions on employee and non-employee use of the employer's EDM system both to preserve its business purpose and to maintain its security and integrity.

Respectfully submitted,



Stephen A. Bokat
Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington DC 20062

(202) 463-5337
Counsel for the Chamber of Commerce of the United States of America

John N. Raudabaugh
BAKER & McKENZIE, LLP
130 East Randolph Drive
Chicago, Illinois 60601

(312) 861-2838
Counsel for Amicus Curiae Chamber of Commerce of the United States of America

J. Robert Brame III
MCGUIREWOODS LLP
310 4th Street NE
Suite 300
P.O. Box 1288
Charlottesville, VA 22902

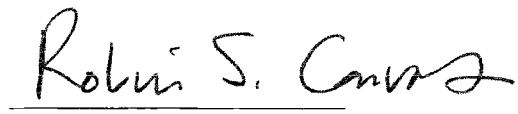
(434) 977-2500
Counsel for Amicus Curiae Chamber of Commerce of the United States of America

REQUEST FOR ORAL ARGUMENT

The Chamber of Commerce of the United States of America hereby respectfully requests permission to present oral argument in this matter by counsel to be designated later.

As the Board undoubtedly realizes, the questions presented are not only fundamental to the administration of the NLRA, but have the potential to impact all employers who utilize EDM systems in the United States. No organization in the U.S. represents more employers than the Chamber of Commerce of the United States of America.

Respectfully submitted,



Stephen A. Bokat
Robin S. Conrad
Shane Brennan
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington DC 20062
(202) 463-5337
Counsel for the Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2007, I caused a true and accurate copy of the foregoing brief of *Amicus Curiae* the Chamber of Commerce of the United States of America in Support of Petitioners to be served on the following:

Counsel for Register Guard

The Zinser Law Firm PC
L. Michael Zinser, Esq.
150 Second Avenue North
Suite 410
Nashville, TN 37201
(615) 244-9700
(615) 244-9734 – Fax

Counsel for Eugene Newspaper Guild CWA Local 37194

Barr & Camens
Barbara Camens, Esq.
1025 Connecticut Avenue NW
Suite 712
Washington, DC 20036
(202) 293-9222
(202) 293-6893 – Fax

James B. Coppess, Esq.
C/o AFL-CIO
815 16th Street NW
6th Floor
Washington, DC 20006
(202) 637-5337
(202) 637-5323 – Fax

General Counsel

Seema Nanda
Counsel for the General Counsel
National Labor Relations Board
Division of Advice – Room 10412
1099 14th Street NW
Washington, D.C. 20570
(202) 273-7957
(202 273-4275 – Fax

Ronald Meisburg
General Counsel
National Labor Relations Board
1099 14th Street NW
Washington, D.C. 20570
(202) 273-3700
(202) 273-4483 – Fax

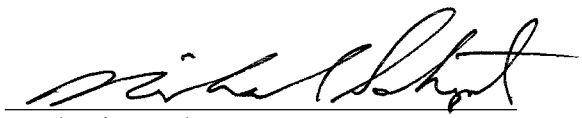
Executive Secretary

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street NW
Washington, D.C. 20570
(202) 273-1991

Deponent is over the age of 18 years and not a party to this action.

I further certify under penalty of perjury that under the laws of the United States of America the foregoing is true and correct.

Executed on February 9, 2007.



Michael P. Schept, Esq.